

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF MARYLAND  
SOUTHERN DIVISION

- - - - - x  
CALVERT LLEWELLYN JEREMY :  
and : Case No. 13-29597-TJC  
JOLITA MERVINA JEREMY, :  
 : Chapter 13  
Debtors. :  
- - - - - x  
JEREMY, et al., :  
 :  
Plaintiffs, :  
 : Adversary No. 14-00310  
v. :  
 :  
JP MORGAN CHASE BANK, INC., :  
et al., :  
 : May 18, 2015  
Defendants. :  
- - - - - x Greenbelt, Maryland

**HEARING**

(5) MOTION TO DISMISS ADVERSARY PROCEEDING FILED BY DEFENDANT  
JP MORGAN CHASE BANK, NATIONAL ASSOCIATION

BEFORE: HONORABLE THOMAS J. CATLIOTA, Judge

APPEARANCES: JOHN DOUGLAS BURNS, Esq.  
The Burns Law Firm, LLC  
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Greenbelt, Maryland 20770  
On Behalf of the Plaintiff  
  
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On Behalf of the Defendant

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Keynote: "---" indicates inaudible in the transcript.  
"\*" indicates phonetic spelling in the transcript.

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1                                    P R O C E E D I N G S

2                    THE CLERK: All rise. The United States Bankruptcy  
3 Court for the District of Maryland now resumes its regular  
4 session. The Honorable Thomas J. Catliota presiding. Please  
5 be seated and come to order.

6                    On the 2:00 o'clock docket, the Matter of Jeremy, et  
7 al., v. JP Morgan Chase Bank, Inc., et al, Case No. 14-00310;  
8 main Case 13-29597. Counsel, would you please come to the  
9 podium and identify yourselves for the record?

10                   MR. BURNS: John Burns, counsel for the Plaintiff.

11                   THE COURT: Good afternoon.

12                   MR. BURNS: Good afternoon, Your Honor.

13                   MS. WILLIAMSON: Good afternoon, Your Honor.

14 Christina Williamson on behalf of the Defendant.

15                   THE COURT: Good afternoon.

16                   MS. ASHRAFI: Your Honor, Safa Ashrafi on behalf of  
17 the Defendant.

18                   THE COURT: Good afternoon.

19                   All right. We are here on a motion to dismiss the  
20 adversary proceeding. Ms. Williamson, it is your motion.

21                   MS. WILLIAMSON: Thank you, Your Honor. Your Honor,  
22 today in the Jeremy case we are here on a motion to dismiss for  
23 failure to state a claim. In the complaint the Debtors are  
24 attempting to cram down the first lien of a mortgage, which is  
25 clearly not allowable and is an exception to the modification

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1 provision. And 1322(b) clearly states that principal residence  
2 cannot be crammed down, cannot be bifurcated. And many  
3 different proceedings at this court have been heard with  
4 relation to the first lien attempt, cram down attempt. And  
5 most recently, this has gone in front of the United States  
6 District Court on appeal in *Akwa versus Residential Credit*  
7 *Solutions*. We still have a Westlaw cite on that, 2015 Westlaw  
8 2085191, District of Maryland decided, and signed on April 30,  
9 2015, where we had already filed a motion to dismiss based on  
10 failure to state a claim for the inability to modify the first  
11 lien of the mortgage.

12           The Jeremys are making an attempt to state that there  
13 is additional collateral in the form of rents and escrow and  
14 insurance. But we have clearly seen through the various  
15 memorandum opinions, through this series and most recently in  
16 the *Akwa* decision at the District Court level, that the rents,  
17 escrow, and any other extraneous amounts that are usual and  
18 inextricably bound to the real property are the principal  
19 residence combined.

20           It is defined in 10127(b), incidental property,  
21 property that includes escrow, rent, insurance proceeds. This  
22 was further bolstered in the opinion of the District Court  
23 where it specifically says that the inclusion of rents and  
24 escrow is deeming additional security and to not consider these  
25 to be part of the principal residence will completely

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1 eviscerate the anti-modification exception of 1322(b).

2           These items are clearly to protect the investment.  
3 They are not separate and apart. And in this particular case,  
4 we fully acknowledge that there is a specific provision in the  
5 deed of trust that does state -- and I will quote for  
6 clarity -- "The escrow funds are pledged at the additional  
7 security for all funds secured by this security instrument."  
8 But it goes on to state "If borrower tenders, surrender the  
9 full payment of all such sums, borrower's account shall be  
10 credited with the balance remaining for all installment items  
11 A, B, and C, insurance, taxes, and so forth. And the mortgage  
12 insurance premium installment that lender has not become  
13 obligated to pay to the secretary, the lender shall promptly  
14 refund all excess funds to the borrower. Immediately prior to  
15 a foreclosure sale of the property or its acquisition by  
16 lender, borrower's account shall be credited with any balance  
17 remaining for all installments for items A, B, and C.

18           So it is quite obvious that these items are  
19 completely flagged for a very specific purpose of protecting  
20 the collateral that is well defined. I don't think we have any  
21 argument about. The collateral is well defined in the deed of  
22 trust.

23           So *In Re. Davis* was incorporated in the *Akwa*  
24 decision. It is 989 F.2d. 208, a Sixth Circuit case from 1993.  
25 And it says that hazard insurance is merely a contingent

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1 interest, an interest that is irrelevant until the occurrence  
2 of some intervening event. And it goes on to discuss rents,  
3 royalties, profits, so forth. They are the ones that I quoted  
4 earlier that specifically said deeding additional security will  
5 completely eviscerate the anti-modification exception.

6 Bankruptcy Code clearly defines where we are with  
7 regard to what is principal residence, what is the target of  
8 1322(b). That being said, we also have a grand public policy  
9 concern that I mentioned in my motion to dismiss. If we were  
10 to allow for bifurcation of any loan that would have a  
11 provision with regard to escrow, this is an FHA loan. FHA  
12 would then no longer be interested in sponsoring these loans.

13 Akwa said maybe the Debtor would be on more solid  
14 ground, if the deed of trust explicitly attempted to take a  
15 secured interest in additional collateral. They cited a series  
16 of cases, a trial court level decision, but there is also other  
17 decision, primarily I note *In Re. Lunger\**, that says that the  
18 incidental property cannot be ignored. And the purpose is that  
19 we can't have a structure of lending that is going to note  
20 engage lenders to want to lend more to support the residential  
21 home mortgage industry.

22 There may be a door that was cracked at the end of  
23 the Akwa decision, but I would say that the Bankruptcy Code  
24 definitions are very, very finite and clear. And the deed of  
25 trust is obviously going to be construed in a fashion that is

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1 not violating federal law.

2 And we would ask for the motion to dismiss to be  
3 granted, as this is not a lien that can be modified by 1322(b).

4 Thank you, Your Honor.

5 THE COURT: All right. Thank you.

6 Mr. Burns?

7 MR. BURNS: Afternoon, Your Honor.

8 THE COURT: Good afternoon.

9 MR. BURNS: Not surprisingly, we see the issue  
10 somewhat differently. We have heard, perhaps by my count, nine  
11 times that things are clear in the Bankruptcy Code, definitions  
12 are clear, and that there is no ambiguity concerning the  
13 definition in the Code. And we are in full agreement on that.

14 We have a situation here in the Jeremy case that is a  
15 little different than any of the decisions which have hit this  
16 Court's docket in other cases. *Birmingham*, in the case of  
17 *Akwa, Abduce\**, and *Donaldson\**, four decisions have been ruled  
18 upon, in Fannie Mae deeds of trust. This is the first FHA deed  
19 of trust.

20 The FHA deed of trust, as Your Honor is aware from  
21 the case law, primarily concerns federal cases out of the  
22 District of North Carolina, cases from Indiana, and so forth,  
23 dealing with the assignment that is found at paragraph two of  
24 the deed of trust. And paragraph two of this deed of trust is  
25 identical to the deed of trust in several of those cases, those



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1 cases being cited in my materials, the *Hughes* case, which is H-  
2 u-g-h-e-s, and the *Bradsher*\* case, both by Judge Stocks of the  
3 Bankruptcy Court for the District of North Carolina.

4 And the phrase in the deed of trust here is "The  
5 escrow funds are pledged as additional security for all sums  
6 secured by the security interest." Period. No comma, no dash,  
7 no continuation, just period. And Your Honor, Judge Stocks in  
8 reading the deed of trust that was implicated in the *Hughes*  
9 decision and the *Bradsher* decision found that that was a  
10 sufficient conveyance clause under North Carolina law to pledge  
11 and assign escrow funds as additional collateral.

12 Now, those decisions have been joined by other  
13 decisions, the *Arne*\* decision, which I cited to, which found  
14 that rents were also in the nature of additional collateral.  
15 And I might note that Judge Stocks made a particular mention  
16 analysis the *Hammond* case, a Third Circuit disposition which  
17 predated the 2005 BAPCPA amendments, which found that Congress  
18 knew exactly what it was writing when it wrote 1322(b)(2) and,  
19 I would submit in agreement with my distinguished colleague  
20 here, that Congress knew exactly what it was writing when it  
21 wrote 101 of the Code with the sub-definitions found, of  
22 course, at, I believe, 13(a) and 29(b) that deal with the  
23 definition of a debtor's principal residence and incidental  
24 property.

25 But first, before we turn to the cases and the

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1 theories, Your Honor, I did just want to peruse very quickly  
2 the deed of trust here, because there are several places that  
3 we contend the security interest was created. And just so that  
4 my argument is short and succinct, the bottom line, Your Honor,  
5 we contend that, number one, under Maryland law there was a  
6 security interest created. I think that is pivotal, because if  
7 there is no security interest created, obviously then that  
8 raises the issue of upon what is the Debtor in this case  
9 relying. And we believe that in at least two to three places  
10 there is a security interest created.

11 Secondly, whether the items under Maryland law are  
12 real property and, thirdly, whether 13 -- actually, forgive me.  
13 I mis-cited before. I believe it is 13(a) and 29(b) of --

14 THE COURT: 370.

15 MR. BURNS: -- 101 that --

16 THE COURT: 27(b).

17 MR. BURNS: 27(b). Your Honor has got it; I don't.

18 My apologies.

19 THE COURT: That is okay.

20 MR. BURNS: But be that as it may, whether that  
21 changes anything. So first and foremost we have at Section 2 a  
22 definition of escrow funds. And it is a lengthy definition.  
23 But in essence it provides for the mortgage insurance, monthly  
24 charge instead of a mortgage insurance, or reasonable amount to  
25 be determined by the secretary and called upon as escrow items.

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1 THE COURT: Well, actually, the monthly charge is  
2 excluded from the escrow funds, as I read it.

3 MR. BURNS: Shall also include the monthly -- each  
4 monthly payment. And again, I am referring to the last  
5 paragraph of --

6 THE COURT: Read the last sentence of that paragraph.

7 MR. BURNS: "And sums paid to the lender are called,  
8 except for the monthly charge," that is true, "by the  
9 secretary." That is correct. "Except for the monthly charge  
10 by the secretary. These items are called escrow items. And  
11 the sums paid to the lender are called escrow funds."

12 THE COURT: So it is the funds that the debtor  
13 submits to the lender are the escrow items.

14 MR. BURNS: Correct.

15 THE COURT: Yes.

16 MR. BURNS: Correct, Your Honor. And these are  
17 ultimately annual mortgage insurance monies. And what these  
18 represent in Judge Stocks's view is additional collateral  
19 because in his judgment there was actual language of  
20 assignment, the word pledge. Now, there is also words as  
21 additional security. But be that as it may, Judge Stocks  
22 looked at the issue from paragraph two and only paragraph two,  
23 which I think is very important in this case. Because when we  
24 go forward, Your Honor, to paragraph six -- and I do just want  
25 to jump over that for a second, jump over paragraphs four and

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12

1 five -- paragraph six deals with condemnation. And it states  
2 in relevant part, "The proceeds of any award of claim for  
3 damages, direct or consequential, in connection with any  
4 condemnation or other taking of any part of the property or for  
5 conveyance in place of condemnation are hereby assigned and  
6 shall be paid to lender to the extent of the full amount of the  
7 indebtedness that remains unpaid under the note and the  
8 security interest." And other provisions follow as to how the  
9 lender is to apply that to the security, excuse me, to the  
10 indebtedness.

11 So at paragraph six we have the likewise phrase "as  
12 to condemnation." Now the difference between paragraph two and  
13 paragraph six really is a word, "pledged" versus "assigned,"  
14 and the phraseology of "as additional security."

15 I also would note, Your Honor, if we go to the rents,  
16 which I do wish to turn to at paragraph 17, which is assignment  
17 of rents, it says at the first sentence, "Borrower  
18 unconditionally assigns and transfers to lender all the rents  
19 and revenues of the property."

20 Now, that likewise contains the word "assign" and  
21 "transfer." And it may say unconditional, but we know from the  
22 case of *Bethesda Air Rights* in this district that an  
23 unconditional assignment of rents is merely a security  
24 interest, not a transfer of ownership.

25 So here again, we have another paragraph that we find

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1 in this FHA deed of trust. I think this is significant for  
2 three reasons, Your Honor. Judge Stocks in reviewing the deeds  
3 of trust in *Hughes* and the deed of trust in *Bradsher* had this  
4 deed of trust in front of him. And I can point the Court, if  
5 the Court wishes to, to an exhibit we have in the *Abdosh*\*  
6 appeal pending before Judge Messitte where those actual deeds  
7 of trust exist, or I can upload them as subsequent exhibits, if  
8 Your Honor wishes to see them. But I will represent these are  
9 the same deeds of trust in *Bradsher/Hughes* as we have before us  
10 right here in the Jeremy case.

11 What is significant about this, Your Honor, is in  
12 both *Hughes* and *Bradsher* Judge Stocks only looked at paragraph  
13 two. No one argued anything beyond paragraph two. And the  
14 parties' analysis and the Court's ruling began and stopped with  
15 the escrow fund.

16 There is then a case of *Mullins*. And in *Mullins*  
17 Judge Stocks looked at a Fannie Mae deed of trust, which did  
18 not have the language as to paragraph two, which said, of  
19 course, as you know, that as additional security words to the  
20 effect that there is a pledge of the escrow items as additional  
21 security. However, the Fannie Mae deed of trust, which is  
22 implicated here because, again, my opposing counsel argues the  
23 *Akwa* decision and what relevance it has here has at paragraph  
24 11 the phrase "all miscellaneous proceeds are hereby assigned  
25 to the lender." Period.

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1           Now, I would submit to the Court that there is not  
2 just one assignment of a security interest in this FHA deed of  
3 trust we have before us. I want to raise it so that wherever  
4 this case goes from here is preserved for the record. But we  
5 have an assignment at paragraph 17. We have an assignment at  
6 paragraph 5. And we have -- excuse me, paragraph 17, paragraph  
7 6. And we have an assignment at paragraph 2.

8           At paragraph four we have language which is  
9 equivalent to an assignment in my judgment, and that is in  
10 fire, flood, and other hazard insurance. And that provides at  
11 the second paragraph of Section 4, I should call it, "Each  
12 insurance company concern is hereby authorized and directed to  
13 make payment for such loss directly to lender instead of to  
14 borrower and to lender jointly. All or any part of the  
15 insurance proceeds may be applied by lender at its option to  
16 either to the reduction of the indebtedness under the note and  
17 the security interest first to any delinquent amounts by the  
18 order of paragraph three and then to prepayment of principal  
19 or to the restoration or repair of the damaged property."  
20 Period.

21           And it does state at the end that any excess  
22 insurance proceeds over an amount required to pay all  
23 indebtedness under this note, the note and the security  
24 interest, shall be paid to the legal entity legally entitled  
25 thereto -- to the entity legally entitled thereto.

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15

1           Forgive me, Your Honor. I don't have my right  
2 glasses today.

3           I think the gist of this is that there is a  
4 direction, an assignment of proceeds, without the word  
5 "assignment." And we contend under paragraph four there was  
6 likewise an assignment.

7           So under Maryland law -- I have cited case law to the  
8 proposition that there is a very flexible and informal standard  
9 under the *Tilman*\* case and otherwise for assignments, creations  
10 of security interest -- all you need is language which  
11 evidences an intent to create a security interest and certain  
12 other particulars as to the transfer of value and so forth.  
13 And you also need, in the instance of a security interest under  
14 Maryland law, a document or possession.

15           Now --

16           THE COURT: To create a security interest, doesn't  
17 the Debtor need to have rights in the collateral?

18           MR. BURNS: I believe the Debtor does. And I believe  
19 under these three things --

20           THE COURT: What about under the -- is there any  
21 allegation that there are condemnation proceeds or there are  
22 rents in this case?

23           MR. BURNS: I am glad you asked that, Your Honor,  
24 because *Hughes* dealt with that very issue. And in *Hughes*,  
25 Judge Stocks said there does not have to be actual collateral.

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1 THE COURT: Leave aside *Hughes*, doesn't, for there to  
2 be a security interest in something, doesn't -- it is sort of  
3 the old basic school, law school, is the debtor has to have  
4 rights in the collateral to grant a security interest, among  
5 other things, among the pledge, among the --

6 MR. BURNS: Sure.

7 THE COURT: So if the debtor doesn't have any  
8 condemnation proceeds or if there aren't any rents, how could  
9 there be a security interest in something that doesn't exist?

10 MR. BURNS: I think it is again to the same situation  
11 as where someone buys a car, and there is a pledge of insurance  
12 proceeds, which are separate, of course, from the car. And  
13 then the debtor gets insurance later. And the debtor has those  
14 when there becomes an accident and then is paid even though it  
15 didn't apply originally after acquired proceeds, things of that  
16 nature. I don't think the debtor has to have an actual  
17 possessory or ownership interest.

18 I would note the Debtor amended its schedules to the  
19 extent these funds exist. They are on Schedule B, as amended.  
20 But I do not believe that the --

21 THE COURT: Which, the rents and the condemnation  
22 proceeds?

23 MR. BURNS: Any incidental and miscellaneous  
24 property, I believe it says.

25 THE COURT: In this case, are there such things?



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1 MR. BURNS: We don't know. And we don't know because  
2 we are not --

3 THE COURT: Don't you represent the Debtor?

4 MR. BURNS: I do, Your Honor.

5 THE COURT: And you don't know if there are any  
6 condemnation proceeds or rents from this property?

7 MR. BURNS: As of the date of the petition, there was  
8 an expectancy, to the extent they arrived and the Debtor  
9 conveyed that at the time of the security interest.

10 THE COURT: Well, here is what I am trying to find  
11 out. This is a motion to dismiss.

12 MR. BURNS: Yes, Your Honor.

13 THE COURT: And so, you know, we have the issue about  
14 a plausible claim. It is not summary judgment. But the  
15 complaint doesn't allege that condemnation proceeds or rents  
16 exist. So I presume as of the petition date, or I presume they  
17 don't exist now.

18 MR. BURNS: Not to my knowledge. They are an  
19 expectancy, and they exist in the future.

20 THE COURT: I understand your argument. Okay.

21 MR. BURNS: Right. But no, there are no funds in  
22 anyone's possession that I am aware of for condemnation. There  
23 are no funds in anyone's hands for rent. Actually, that is not  
24 true. The daughter is renting on a month-to-month basis with  
25 Ms. Jeremy, so that is the case. There are rents for that.

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18

1 She has taken the daughter as a tenant, as a, you know,  
2 licensee perhaps would be the better word.

3 And as to the issue of mortgage insurance, I believe  
4 that does exist under this loan as being paid. So that  
5 collateral exists under Section 2. I believe that there is  
6 a -- I believe there is certainly fire, floor, and hazard  
7 insurance, because I remember seeing the policy as a rider. So  
8 the Debtor is maintaining insurance on the property. So the  
9 only thing that would not be in the possession, quote-unquote,  
10 of the Debtor it would seem at this time is condemnation  
11 proceeds because there has been no condemnation. But if there  
12 is condemnation, our position is that the deed of trust would  
13 cover it because the lender secured those as additional  
14 rights.

15 So we believe there is a security interest created.  
16 We believe there are words of assignment. We believe there is  
17 value that has been given. And most significantly, we believe  
18 in the context of all of these provisions in this deed of  
19 trust, not just Section 2, that these are not as the words  
20 were used, I believe, in *Akwa* and certainly in argument today  
21 in the nature of an inextricably bound asset to the real  
22 property.

23 *In Re. Enis\** is a Fourth Circuit case. And in *Enis*  
24 the Court looked at whether there was a mobile home that was in  
25 essence somewhat -- was not modifiable. The Fourth Circuit

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19

1 went on at length about the nature of real property, what it  
2 was under, I believe, North Carolina law in that case, and  
3 spoke to the need when Congress amended 101-13(a) and 27(b), to  
4 have incorporated real property to those definitions, which  
5 Congress did not do.

6 I am unaware of any theory, any case, under Maryland  
7 law which has cited to insurance, to rents, to escrow funds,  
8 condemnation proceeds as real property. Maryland law is very  
9 fixed on the notion that fixtures and improvements attached to  
10 land of real property. There is even some definitions in the  
11 Maryland Real Property Code as to an interest in real property.  
12 And I know that that has come up in one of these cases, but  
13 that is defined by Maryland case as being an ownership  
14 interest. It is not an interest in the real property as to  
15 some sort of subsequent tagalong type of asset.

16 Now Akwa and Judge Hazel says it doesn't really  
17 matter, because under *Butner*\* the Bankruptcy Court can just  
18 ignore Maryland law, if it conflicts with federal bankruptcy  
19 law. And the problem in that interpretation is that it doesn't  
20 conflict. In other words, Section 101-13 and 101-27 do not  
21 require real property to be a part of those elements of a  
22 debtor's principal residence or incidental property. In fact,  
23 they condition it. It can be --

24 THE COURT: How would any of these items in 101-27(b)  
25 be pertinent to Section 1322(b)(2) under your reading? But you

1 have to start with real property. If you start with real  
2 property, then -- without real -- since this is not real  
3 property, you are out. Well, then how could any of those items  
4 in 101-27(b) ever be pertinent?

5 MR. BURNS: Well, I don't know what Your Honor means  
6 by "pertinent."

7 THE COURT: Ever be applicable to the language of  
8 1322(b)(2).

9 MR. BURNS: Your Honor, they are applicable to the  
10 extent that there is a definition of the Debtor's principal  
11 residence. And where there is a mobile home, for example, as  
12 in *Enis* they are totally applicable because that is not real  
13 property.

14 THE COURT: But what I hear you saying is you have to  
15 have -- it has to be real property. And in this case, since  
16 there is rents, condemnation proceeds, escrow, that is not real  
17 property; therefore, you stop reading 1322(b)(2) at that point,  
18 because it is not real property. Then what would be the phrase  
19 "that is the Debtor's principal residence"? What would be the  
20 significance of that phrase in 1322(b)(2)?

21 MR. BURNS: I think it is extraneous other than to  
22 the fact that a debtor's principal residence can be modified.  
23 I think 13 -- whether or not -- 101-13(a) simply says a  
24 debtor's principal residence does not need to be real property.  
25 Period. It is that basic. And as a result, under 1322(b)(2),

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21

1 a debtor's principal residence can always be modified unless it  
2 is solely the only collateral and real property. And that is  
3 what they wrote.

4 Now, what they meant, I have cited -- we have cases  
5 all over the place. We have law review articles. We have  
6 almost zilch in legislative history. If you look at  
7 legislative history, it is almost like someone was a sleep at  
8 the wheel when they wrote 101-13(a) and 279(b). But what is  
9 more remarkable is that *Nolan*,\* who has been around for  
10 forever. You know, *Hammond* has been around forever. Most of  
11 these cases, *Escue*\* has been around forever, and not once has  
12 the lending industry, who is here crying, you know, foul,  
13 ever modified any of these deeds of trust for FHA or Fannie  
14 Mae.

15 Now I hear what we call policy arguments. And it is  
16 interesting, Your Honor, we have a line of cases in terms of  
17 the statute, and it says these are in fact not real property  
18 and are separate or some other basis like the rents, and they  
19 are outside the scope of 101-13(a) and 1322(b)(2). And then  
20 you have a whole line of other cases that Judge Hazel cited and  
21 my esteemed colleague, Ms. Williamson, has cited, and, quite  
22 frankly, that I have cited for the proposition on the other  
23 side. But each and every one of those cases, as I have  
24 itemized, has said it would be an enormous hardship for the  
25 lending industry where policy dictates that this is the wrong

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22

1 result or this is going to have these horrific, apocalyptic,  
2 you know, results on the lending industry.

3 And the reality is that may be true or not, but it is  
4 not the purpose of statutory interpretation to read words of a  
5 statute and read words in when a committee didn't put them in.  
6 And they certainly didn't provide any legislative history to  
7 say this is meant, as Judge Manus said in *Akwa*, to clarify  
8 confusion among the bankruptcy judges. The only confusion that  
9 exists among the bankruptcy judges is when we are trying to  
10 take concepts of real property saying, well, these are really  
11 the sort of substitute for real properties, so we are going to  
12 say they are real property even though they are not real  
13 property. And if that doesn't work, we are going to say that  
14 the lenders have a policy, and they are going to be hurt by  
15 these types of determinations.

16 Now, one thing the Court ought to know is that *Akwa*  
17 is on appeal in the Fourth Circuit, by the way, as were all of  
18 those cases.

19 THE COURT: I am sure. I am sure I won't be the last  
20 word on this, Mr. Burns.

21 MR. BURNS: Well, it is going to go on for a while.  
22 But I started by saying, Your Honor, I wanted to examine the  
23 security interest instrument, point out the security interest I  
24 sought, address a Maryland conveyance and creation of security  
25 interest, address Maryland law and real property, and then to

1 look at the distinctions under 101-13(a) and 101-27(b). And I  
2 would simply say that if this Court were writing on a clean  
3 slate without *Enis*, I do believe still the Court should lend  
4 itself to authentic, limited, conservative judicial  
5 interpretation of these words, plain words.

6 But with *Enis*, I mean, we are dealing with a Fourth  
7 Circuit case that has said that real property is not  
8 encompassed within the ambit of 101-13(a) and 27(b). And I do  
9 believe that that matters a great deal. I would just note,  
10 Your Honor, there has been no evidence submitted that FHA would  
11 no longer make loans.

12 The *Davis* case is a Sixth Circuit case. It is not  
13 binding on this Court. But I believe that Judge Hazel has  
14 already addressed its reason. And I have certainly addressed  
15 what I see is its laws.

16 Unless the Court has any further questions, I will be  
17 seated.

18 THE COURT: No. Thank you.

19 Ms. Williamson, anything further?

20 MS. WILLIAMSON: Just briefly to go to the Maryland  
21 Code references. In regard to the Maryland Code, real  
22 property article defines property as real property or any  
23 interest therein or pertinent thereto. That is Maryland Code  
24 1-101(k).

25 And if there is not sufficient state law, which I

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1 think is admitted to from my colleague -- and I agree there is  
2 really not sufficient case law that talks about the items we  
3 are talking about today -- that the lack of coherent body of  
4 case law requires the Court to fall back to the Bankruptcy  
5 Code.

6 THE COURT: That is usually where I start.

7 MS. WILLIAMSON: And we are in Bankruptcy Court, so  
8 it does seem the best place to be. But we don't have a  
9 conflict with regard to Maryland law. And I think that Akwa  
10 made it very clear that we are going to look at the Bankruptcy  
11 Code. And the definitions in the Bankruptcy Code obviously do  
12 include all of these items that are trying to be ripped apart  
13 as separate collateral.

14 And the legislative history component or Mr. Burns's  
15 statement, I do think that we can't ignore the fact that there  
16 was acknowledgment in *Nobleman* that talked about the  
17 legislative history. I looked to the consenting opinion of  
18 Justice Stevens, and he specifically says explained by the  
19 legislative history indicating the favorable treatment of  
20 residential mortgages was intended to encourage the flow of  
21 capital into the home lending market. It clearly is in the  
22 legislative history. It has been cited in cases up to the  
23 Supreme Court. And it is a valid concern that was always there  
24 and present while they were developing this. And the Code is  
25 very clear. It says principal residence.



1           The Bankruptcy Code goes on to define what the  
2 principal residence is, that it includes the additional items  
3 that we have at contest here today. And we will feel as  
4 though, even aside from a slight little crack in the door as  
5 I mentioned before that *Akwa may have provided, that the*  
6 general overall ruling is still going to lead us in the  
7 direction that this is not a loan that can be modified under  
8 1322(b)(2).

9           THE COURT: All right. Thank you.

10          MS. WILLIAMSON: Thank you.

11          MR. BURNS: Your Honor, may I address two points very  
12 quickly?

13          THE COURT: Yes.

14          MR. BURNS: First of all, Ms. Williamson raised the  
15 definition under Maryland Code, which I touched on. But I did  
16 wish to just note that the word "interest" in real property for  
17 the Maryland Code has been treated solely as an equitable  
18 interest in real property that would entitle an interest holder  
19 to seek partition of the real property parcel at issue, meaning  
20 it is not an enhancement to property. it is some owner's right  
21 to take action.

22               And I have some of the cases, *Triantis versus*  
23 *Triantis*, T-r-i-a-n-t-i-s, 408 Md.App. 703, a 2009 case.

24 Secondly, Your Honor, I do wish to note that real property  
25 under Maryland is also defined as simply land. And that is

1 also in the definition. And that, of course, enhances what the  
2 actual meaning is.

3 Your Honor, with that and my brief, which  
4 addressed the --- issues in more detail, I will be seated.

5 THE COURT: All right. Thank you.

6 All right. Before me is an issue to be resolved by  
7 reference to Section 1322(b)(2) of the Bankruptcy Code in the  
8 first instance. That provision provides that a Chapter 13  
9 plan may "modify the rights of holders of secured claims other  
10 than a claim secured only by a security interest in real  
11 property that is the debtor's principal residence," as  
12 pertinent here.

13 The Bankruptcy Code provides further guidance onto  
14 what is a debtor's principal residence. Section 101-13(a),  
15 which was added to the Bankruptcy Code for the 2005 amendments,  
16 provides in pertinent part that a debtor's principal's  
17 residence "means a residential structure, if used as the  
18 principal residence by the debtor, including incidental  
19 property."

20 Section 101-27(b) provides guidance on what  
21 incidental property means. And it provides that the term  
22 incidental property means with respect to the debtor's  
23 principal residence, among other things "all easements, rights,  
24 appurtenances, fixtures, rents, royalties, mineral rights, oil  
25 or gas rights or profits, water rights, escrow funds, or

1 insurance proceeds." And that is 101-27(b).

2 I conclude, based on the statutory framework, that  
3 the motion should be granted and the complaint should be  
4 dismissed in that the allegations in the complaint do not state  
5 a claim that the deed of trust in this case can be modified  
6 under the provisions of 1322(b)(2). Stated otherwise, I  
7 conclude that this loan is secured only by a security interest  
8 in real property that is the Debtor's principal residence, as  
9 that phrase is used in 1322(b)(2).

10 I am not writing on a clean slate. I adopt Judge  
11 Manus's view in the decision of *In Re. Akwa*, A-k-w-a, which he  
12 signed on July 18, 2014. One reference to that memorandum is  
13 in Adversary Case 14-267, Docket 13, entered on July 18, 2014.  
14 Judge Manus went through the changes to the Bankruptcy Code by  
15 the 2005 amendments, including the changes to Section 101(a)  
16 and 101-27(b), as I have just read, and concluded that these  
17 cited provisions do not enable the Debtor to bifurcate the  
18 secured lender's claim in that case.

19 Like Judge manus, I also rely on the decision of *In*  
20 *Re. Davis*, which is a Sixth Circuit case. In *Davis*, which is  
21 at 989 Fed.2d. 208, Sixth Circuit 1993, the Sixth Circuit  
22 basically determined that the security interest must extend  
23 beyond terms that are "inextricably bound to the real property  
24 itself, as part of the possessory bundle of rights." And that  
25 is 989 Fed.2d. 213. That case involved rents and royalties.

1 And the Court found that those were inextricably bound to the  
2 real estate, and therefore the anti-modification provision did  
3 not apply.

4 And more recently, Judge Hazel of the District Court  
5 affirmed Judge Manus in a case cited at 215 Westlaw 2085191.  
6 Judge Hazel relied on the language of the Bankruptcy Code and  
7 also the *Davis* case and concluded that in the facts before it  
8 or the matter before it, before Judge Hazel, the loan could not  
9 be modified.

10 While the parties point out that toward the end Judge  
11 Hazel, his opinion, Judge Hazel did say that the Debtor's  
12 complaint may have been on more solid ground if the deed of  
13 trust explicitly attempt to take a security interest and  
14 additional collateral and pointed out that some courts have  
15 found additional security interest in escrow accounts. I point  
16 out that when Judge Hazel was discussing the *Davis* case earlier  
17 in the opinion, he specifically said, "This rationale also  
18 applies to escrow funds and miscellaneous proceeds that are  
19 inexplicably tied to the real property." And I agree with that  
20 sentiment in light of the language of Section 101-27(b), which  
21 expressly includes escrow funds.

22 In this case, the escrow funds are mortgage  
23 insurance, taxes, and insurance premiums. And those items  
24 are, of course, in my view inexplicably bound to the real  
25 estate.

1 I disagree with the Debtor's reading of Section  
2 1322(b)(2). The Debtor would read that if the security  
3 interest is in something in real property, then all bets are  
4 off. And at that point, the anti-modification provision  
5 doesn't apply. The Debtor points out that escrow funds, rents,  
6 royalties, and insurance are not "real property" within the  
7 meaning of 1322(b)(2), and therefore the anti-modification  
8 provision should not bar the modification of the Debtor's loan  
9 in this case.

10 However, the basic standard, basic tenet of statutory  
11 construction that the statute should be read so that all words  
12 are given effect. The precise phrase is a security interest in  
13 real property that is the Debtor's principal residence. As I  
14 understand the Debtor's argument, if you look solely to the  
15 term real property, then you never really get to the  
16 significance of what does the phrase "that is the Debtor's  
17 principal residence" mean. And therefore, the definition of  
18 101-27(b), which was added to the Bankruptcy Code in 2005 would  
19 never have significance to the operation of 1322(b)(2) because  
20 those items are not real property.

21 So I believe that the Debtor's interpretation of  
22 1322(b)(2) reads out of that provision the phrase "that is the  
23 Debtor's principal residence," and thereby essentially reads  
24 out of the definition the -- excuse me. Therefore reads out of  
25 Section 1322(b)(2) the definitions added to the Bankruptcy Code

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1 at 101-13(a) and 101-27(b) .

2 So for those reasons I am going to enter an order  
3 dismissing the complaint, and we will see where this goes.

4 Thank you very much.

5 MS. WILLIAMSON: Thank you, Your Honor.

6 MR. BURNS: Will Your Honor enter an oral motion for  
7 direct certification of the United States Fourth Circuit  
8 pursuant to 157 Title 28?

9 THE COURT: Well, you all have opportunity to talk  
10 about that. And you either have to do it by agreement or if  
11 you ask, I have to -- you could do it by a motion. But I am  
12 not going to accept an oral motion.

13 MR. BURNS: Very well. Thank you, Your Honor.

14 THE COURT: Thank you.

15 (Whereupon, the hearing was concluded.)  
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C E R T I F I C A T E

I certify that the foregoing is a correct transcript  
from the provided electronic sound recording of the proceedings  
in the above-entitled matter.

*Gail Williams*      *07-06-2015*

Gail A. Williams      Date

Certified Transcriber

Certificate No.:    CET\*\*434